

**Congress of the United States**  
**Washington, DC 20515**

January 16, 2019

The Honorable Donald J. Trump  
The President  
The White House  
Washington, DC 20500

Dear Mr. President:

You have publicly indicated several times that you may seek to declare a national emergency in order to fund the construction of a physical barrier along the southern border of the United States. Also, a number of news reports suggest you are considering utilizing a previously unused statutory authority to reallocate existing funds of the U.S. Army Corps of Engineers (Corps) for this construction.

We believe that any suggestion that you could use this statutory authority for this purpose is misinformed. Simply put, this authority does not authorize you to reallocate existing Corps funds – including, but not limited to, approximately \$14 billion in disaster funds for communities impacted by the 2017 and 2018 hurricanes or other natural disasters – for the construction of the physical barrier. In addition, we oppose the reallocation of existing Corps funds from communities that are just starting to rebuild from the devastation they faced, and for which Congress provided emergency funds to help the lives and livelihoods of our citizens.

Section 923(a) of the Water Resources Development Act of 1986 (33 U.S.C. 2293(a)) states that:

In the event of a declaration of war or a declaration by the President of a national emergency in accordance with the National Emergencies Act (90 Stat. 1255; 50 U.S.C. 1601) that requires or may require use of the Armed Forces, the Secretary, without regard to any other provision of law, may (1) terminate or defer the construction, operation, maintenance, or repair of any Department of the Army civil works project that he deems not essential to the national defense, and (2) apply the resources of the Department of the Army's civil works program, including funds, personnel, and equipment, to construct or assist in the construction, operation, maintenance, and repair of authorized civil works, military construction, and civil defense projects that are essential to the national defense.

As you know, this authority has never been used by the Corps since its enactment in 1986. Therefore, there is no historical precedent on its use by any Presidential administration. However, we believe that a plain reading of this statutory provision does not provide legal authority to reallocate existing appropriated funds of the Corps' civil works program for the construction of the physical barrier along the southern border you have called for.

First, section 923 unequivocally states that actions funded by this provision “*require or may require use of the Armed Forces*” (emphasis added). In our opinion, there is nothing uniquely related to the planning, design, or construction of the physical barrier that would suggest the Armed Forces’ (in this case, the Corps) involvement in these activities is required. We understand that the Corps has, on previous occasions and through its Support for Others authority<sup>1</sup>, participated in prior design and construction activities related to existing barriers along the southern border. But, it is also our understanding that these activities were, at best, supportive roles to other Federal agencies, including the U.S. Customs and Border Protection, and that none of these activities were paid for using the Corps’ civil works funds.

The legislative history of section 923 further highlights Congress’ intent that there be a military nexus as a prerequisite to use of this authority. In contemporaneous hearings before the Senate Committee on Environment and Public Works, the then-Acting Assistant Secretary of the Army (Civil Works) testified on the limited scope of this authority – noting that this authority “would be available only in two limited situations: in time of war declared by Congress, or in time of national emergency, *military in nature*, declared by the President in accordance with the National Emergencies Act”<sup>2</sup> (emphasis added).

It is our belief that construction of a physical barrier along the southern border fails to meet either of these limited situations. On the former, there is no active declaration of war related to the border crossing. On the latter, there is no justification that construction of the physical barrier is military in nature. The term “military in nature,” again, implies that the situation requires the unique presence or involvement of the Department of Defense in its military (Armed Forces) capacity. While the Corps is a component of the Department of Defense, its civil works mission is focused on water resources development activities and emergency response to natural disasters. It is in that capacity that the Corps provides domestic construction-related assistance through its authorized civil works activities, or through its Support for Others authority. Yet, these authorities are solely distinct from the Corps’ role in supporting the combat and installation readiness needs of the Department of Defense. In our view, because construction of a physical barrier does not necessitate the actions of the Department of Defense in its military capacity, the use of the Corps for construction of the barrier would not fall within the limited scope of section 923.

Second, section 923 also requires that any project, for which construction, operation, maintenance, and repair work is funded under this authority, be specifically *authorized* by Congress. As noted in the *Congressional Record* during Senate consideration of the Water Resources Development Act of 1986, “[this] section does not provide authority to construct any project not authorized by law.”<sup>3</sup> Yet, the proposed physical barrier that you are contemplating is not specifically authorized by Congress – not as a civil works project, not as a military construction project, and not

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<sup>1</sup> According to the Corps, the Support for Others program allows the Corps to provide reimbursable technical services to other federal agencies as well as to states, local municipalities, international governments, and Native American Tribes. The program provides services to federal, state, and local agencies that do not have the technical engineering expertise.

<sup>2</sup> Hearings Before the Subcommittee on Water Resources of the Committee on Environment and Public Works, United States Senate, entitled Water Resources Development Act of 1985. S. Hrg. 99-147, pg. 85 (1985).

<sup>3</sup> See Congressional Record, March 14, 1986, at 4926.

as a civil defense project. Therefore, your potential use of this authority for the proposed physical barrier would fail a second test of applicability.

Even if you were to ignore the plain text of section 923, and continue to pursue this authority to reallocate existing funds from the Corps, we want to be very clear who would be impacted by your decision.

It is our understanding that the administration has identified potentially \$14 billion in construction funds from the 2018 Supplemental Appropriations related to Hurricanes Harvey, Irma, and Maria, as well as other disasters (Pub. L. 115-123) and an additional \$2.9 billion in supplemental appropriations related to Superstorm Sandy that remain unobligated. These funds were specifically appropriated by Congress to help communities in impacted states and territories recover from devastating natural disasters.

In July 2018, the Corps released its list of specific projects for which the 2018 Supplemental funds are planned to be utilized. This list includes, approximately:

- \$4.5 billion for the State of Texas;
- \$2.4 billion for the Commonwealth of Puerto Rico.
- \$2.4 billion for the State of California;
- \$1.2 billion for the State of Louisiana; and
- \$700 million for the State of Florida.

Each of the states and territories that received an allocation of emergency supplemental funds by Congress were uniquely impacted by natural disasters.

For example, in the City of Houston, Texas, officials believe that 82 people were killed, 13,000 people were rescued, and more than 42,000 people were forced into shelters by Hurricane Harvey (in addition to the 6 million Texans who were otherwise impacted by the storm). Similarly, in 2017, Puerto Rico faced Hurricanes Irma and Maria, with Maria now designated as the third deadliest hurricane in U.S. history, killing thousands of citizens, and disabling the entire power grid of the Commonwealth for months. While these are just two examples of the devastating impacts of recent natural disasters, they are indicative of why Congress decided to provide robust emergency funding to these and similarly impacted communities that are only now starting to rebuild.

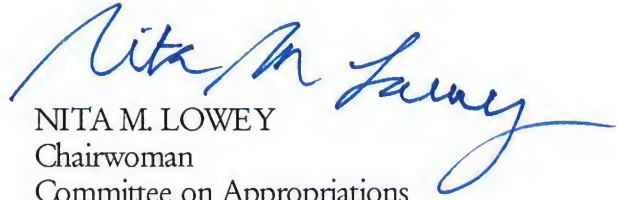
In our view, it would be the height of irresponsibility to take away vital reconstruction funds from communities impacted by recent natural disasters, leaving these communities at continued vulnerability to future disasters, and future loss of life.

Again, we believe that section 923 of the Water Resources Development Act of 1986 does not provide you with legal authority to reallocate existing Corps funds to the construction of a physical barrier along the southern border. In addition, we oppose the transfer of Corps funds away from communities that have already suffered enough from the impacts of recent natural disasters, and strongly urge you not to utilize these allocated recovery dollars for any purpose related to the construction of the physical barrier.

Sincerely,



PETER A. DEFAZIO  
Chairman  
Committee on Transportation  
and Infrastructure



NITA M. LOWEY  
Chairwoman  
Committee on Appropriations



GRACE F. NAPOLITANO  
Member of Congress



MARCY KAPTUR  
Chairwoman-designate  
Subcommittee on Energy and Water  
Development and Related Agencies

cc:

Mr. Rickey "R.D." James  
Assistant Secretary of the Army for Civil Works

Lt. Gen. Todd T. Semonite  
Commanding General and Chief of Engineers